

D.P.U. 91-200

Petition of Tenaska Mass, Inc., seeking an investigation and relief pursuant to 220 C.M.R. § 8.00 et seq., and other applicable laws and regulations, with respect to the refusal of Commonwealth Electric Company to execute and file for approval a Restatement of their Power Sale Agreement.

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ORDER ON JOINT MOTION FOR  
APPROVAL OF SETTLEMENT AGREEMENT

I. INTRODUCTION

On May 11, 1993, Tenaska Mass, Inc. ("Tenaska") and Commonwealth Electric Company ("Commonwealth Electric," or the "Company") filed with the Department of Public Utilities ("Department") a Joint Motion for Approval of a Settlement Agreement. The Settlement Agreement proposed to resolve all issues arising between the parties from a dispute concerning a Power Sale Agreement executed between the parties on April 28, 1987 ("1987 Agreement"); Tenaska's petition to the Department for investigation of this dispute was docketed as D.P.U. 91-200. The parties have requested a deadline of June 18, 1993<sup>1</sup> for approval of the Settlement Agreement. <sup>2</sup>

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<sup>1</sup> The Joint Motion for Approval of the Settlement Agreement initially set June 10, 1993 as a deadline. By letter of June 10, 1993, the parties extended the deadline to June 18, 1993.

<sup>2</sup> To enable the Department to evaluate the Settlement Agreement, and with the consent of all the parties in the case, the Department has marked the following documents as Exhibits DPU-1 through DPU-16, and hereby moves them into evidence: the October 1992 Department Information Requests 1 through 4 (Exhs. DPU-1-4); the April and May 1993 Department Information Requests 1 through 8 on the Settlement Agreement (Exhs. DPU-5-12); the May 29, 1992 Joint Preliminary Statement of Undisputed Facts and Appendix of Exhibits (Exh. DPU-13); the May 29, 1992 Procedural Conference Memorandum of Tenaska with Attachments (Exh. DPU-14); the Initial Procedural Conference Memorandum of Commonwealth Electric with Attachments (Exh. DPU-15); and the 1987 Agreement with Amendments and Exhibits, approved by the Department in November 1987 (Exh. DPU-16).

## II. PROCEDURAL HISTORY

The 1987 Agreement executed between Tenaska<sup>3</sup> and Commonwealth Electric provided that Tenaska would build a 47 megawatt cogeneration unit in Lee, Massachusetts, and Commonwealth Electric would purchase all the power produced by the unit. The 1987 Agreement was approved by the Department in November 1987. In May 1990, after Tenaska's steam host, Kimberly-Clark Corporation, terminated its Steam Agreement with Tenaska, Tenaska proposed to relocate the proposed cogeneration facility to Lowell, Massachusetts. Between May 1990 and May 1991, the parties conducted negotiations for a "restated" power agreement, until Commonwealth Electric terminated negotiations in May 1991. In August 1991, Commonwealth Electric acted to terminate the 1987 Agreement, citing Tenaska's failure to meet contractual milestones under the 1987 Agreement. (Exh. DPU-13, exhs. 1,17).

On September 27, 1991, Tenaska filed a petition with the Department, pursuant to 220 C.M.R. § 8.00 et seq., asking the Department to investigate its claim that Commonwealth Electric wrongfully terminated the 1987 Agreement and failed to file with the Department a "restated" power sale agreement for approval. In addition, on September 25, 1991, Tenaska filed a demand for arbitration with the American Arbitration Association, pursuant to a clause in the 1987 Agreement, which called for arbitration of disputes relating

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<sup>3</sup> The 1987 Agreement was originally executed between Commonwealth Electric and Tondue Energy Systems, Inc. ("Tondue"). On June 11, 1987, Tondue and Tenaska, then known as Lee Mills Cogeneration Company, entered into an Assignment and Assumption Agreement, to which Commonwealth Electric subsequently consented, whereby Tondue conveyed its interest in the Power Sale Agreement to Tenaska.

to interpretation or performance of the contract (Exh. DPU-13).

In November 1991, Commonwealth Electric filed an Application to Stay Arbitration in Middlesex Superior Court.<sup>4</sup> The Superior Court granted Commonwealth Electric's request to stay arbitration on April 7, 1992, noting the Department's primary jurisdiction over the dispute between Commonwealth Electric and Tenaska. The court ordered the Department to review the dispute and identify those issues which are appropriate for arbitration (id., exh. 18).

In October 1992, the Department (1) ordered the parties to file a stipulation of facts and a statement of issues, and (2) issued its first set of information requests. At the request of the parties, the Department held a procedural conference on October 22, 1992. On October 23, 1992, the Department established a schedule for prefiled testimony, evidentiary hearings, and briefing in the case, which extended through June 1993.

The Department received Petitions to Intervene from Altresco Financial, Inc. and Eastern Energy Corporation. On December 4, 1992, the Department granted both parties limited participant status.

From November 1992 to March 1993, the Department received and granted a series of requests from Tenaska and Commonwealth Electric to postpone the schedule to allow settlement negotiations. On April 1, 1993, Tenaska and Commonwealth Electric informed the Department that they had reached a comprehensive settlement of the dispute. On May 11, 1993, the parties submitted the Settlement Agreement for approval. In April and May

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<sup>4</sup> Commonwealth Electric Company v. Tenaska Mass, Inc., Civil Action No. 91-8017 (1992).

1993, the Hearing Officer issued questions regarding the proposed Settlement Agreement, and also asked the limited participants in the case to state their positions on the proposal. On May 18, 1993, Altresco Financial, Inc. indicated that it had no comments on the proposal; on the same date, Eastern Energy Corporation stated that it did not oppose the proposed settlement.

### III. THE PROPOSED SETTLEMENT

Under the Settlement Agreement, Commonwealth Electric must pay to Tenaska a principal sum of \$1,250,000, plus interest accruing at the prime rate (Settlement Agreement, Sec. 2.1). Principal and interest payments must be made monthly, over a period not to exceed 84 months (id.). The Settlement Agreement provides that the principal and interest payments made thereunder shall be recoverable in full from Commonwealth Electric's ratepayers through the quarterly fuel charge (id., Sec. 4.1).

The Settlement Agreement further stipulates that, upon approval of the Settlement Agreement by the Department, the parties shall: (1) execute a joint notice to the American Arbitration Association dismissing the Arbitration proceeding; (2) execute a joint Stipulation of Dismissal in the Civil Action dismissing all claims and counterclaims of the parties; and (3) execute and deliver mutual releases, releasing all claims against each other through the date of the execution and delivery of such releases (id., Secs. 3.1-3.4).

Also pursuant to the Settlement Agreement, in the event that Tenaska or any affiliate, subsidiary, parent corporation, successor-in-interest, or assignee of Tenaska offers to sell power to Commonwealth Electric from the same facility at the same site in Lowell, Massachusetts, or any other substantially similar cogeneration facility at the same site in

response to a Request for Proposals ("RFP") under the Department's Integrated Resource Management ("IRM") Regulations, 220 C.M.R. 10.00, the bid price shall be structured to recognize the principal payments made under the Settlement Agreement, subject to the following conditions (id., Sec. 6.3). In the event delivery of power to Commonwealth Electric under the bid should begin within seven years of the date of the Settlement Agreement, the bid price will be credited the full amount of all principal payments made under the Settlement Agreement. If delivery of power begins during year eight after the date of the Settlement Agreement, the bid price shall be credited by an amount equal to two-thirds of the aggregate principal payments made under the Settlement Agreement. If delivery of power begins during year nine after the date of the Settlement Agreement, the bid price shall be credited by an amount equal to one-third of the aggregate principal payments made under the Settlement Agreement (id.). No credit will be required if power is to be delivered to the Company after year ten (id.).

#### IV. ANALYSIS AND FINDINGS

In assessing the reasonableness of an offer of settlement, the Department must review the entire record as presented in the Company's filing and the record in the case to ensure that the settlement is consistent with the public interest. See Boston Edison Company, D.P.U. 91-233, at 5 (1992); Western Massachusetts Electric Company, D.P.U. 92-13, at 7 (1992); Massachusetts Electric Company, D.P.U. 91-205, at 4 (1991); West Stockbridge Water Company, D.P.U. 91-143, at 6 (1992); Barnstable Water Company, D.P.U. 91-189, at 4 (1992); Cambridge Electric Light Company, D.P.U. 89-109, at 5 (1989).

The Department has evaluated the Settlement Agreement in the context of our

precedent regarding buy-outs of purchased power contracts, and the evidence relating to this contract dispute. The Department has also considered the potential rate impacts of the various dispute resolution options available to these parties relative to the resolution offered by the Settlement Agreement.

In terms of our precedent regarding buy-outs, the Department has both encouraged and approved buy-outs as an option in power purchase contracts. In its Order promulgating IRM rules, the Department expressly:

recommend[ed] that companies attempt to negotiate buy-out provisions into the contracts they sign with third parties during the transition period, regardless of whether the contract was entered into through the resource solicitation process or through negotiation.

D.P.U. 89-239, at 92 (1990).

Subsequently, in the context of a contract dispute arising out of an RFP, the Department concluded that negotiation of a buy-out from RFP obligations was consistent with Department regulations, and, in fact, might be required if the buy-out represented the best option for all parties, including ratepayers. Altresco Lynn, Inc., D.P.U. 91-142/153, at 15 (1991).

The Department also approved a buy-out in Boston Edison Company/Down East Peat L.P., D.P.U. 92-183 (1992)("Down East Peat"). In a hearing on the record, the Department explored various aspects of the Down East Peat proposal, including the basis of the buy-out amount, the costs and savings of different options, and the impact of the buy-out on ratepayers. The Department then approved the Down East Peat buy-out as submitted.

The 1987 purchase power contract between Tenaska and Commonwealth Electric



which gave rise to the dispute in this case was negotiated outside the RFP process and approved by the Department in November of 1987. The subsequent changes in Tenaska's ability to meet the contract terms and the period of negotiations leading to Commonwealth Electric's assertion that the 1987 contract had been terminated extended into 1991. The ensuing dispute between the parties resulted in litigation in three forums, as described above.

The Company states that, in its negotiations with Tenaska and its evaluation of the Settlement, it considered: (1) the power supply planning advantages of the Settlement Agreement; (2) the risks of continued litigation, including financial and other costs; and (3) the potential obligation to enter a purchase power contract or to pay damages. Commonwealth Electric asserts that the Settlement Agreement strikes a reasonable compromise between Tenaska's claims and the interests of the Company in avoiding a purchase of power which it asserts is unneeded and exceeds current and projected avoided costs. The Company claims that the Settlement Agreement is in the best interests of its ratepayers because it minimizes their exposure to potentially much greater costs than those in the Settlement Agreement, and lowers the overall cost of power to the Company (Exh. DPU-9).

In evaluating the proposed Settlement Agreement, the Department has considered the complex and extended nature of the litigation regarding this dispute, both the litigation to date as well as the potential for further litigation. The dispute in this case centers around a good faith claim which would require the Department, at a minimum, to determine such issues as the status of the 1987 Agreement, including the interpretation of its force majeure and arbitration provisions, possible damages or specific performance of the contract, as well

as the reasonableness of the utility's conduct in the 1990-1991 negotiations surrounding changes in the contract terms (Exhs. DPU-14; DPU-15). The October 22, 1992 procedural conference in this case and the May 29, 1992 scoping memoranda filed by the parties make clear the complex nature of the dispute. Continued litigation of this dispute, whatever the outcome, could result in additional costs to ratepayers far in excess of the Settlement Agreement amount. In addition, if Commonwealth Electric were ordered to enter into a contract with Tenaska, the utility's obligation would certainly exceed the \$1.250 million Settlement Agreement amount; for example, based on the costs of the 1987 agreement, a similar power purchase contract with Tenaska could cost Commonwealth Electric's ratepayers as much as \$213 million (Exh. DPU-16, exh. 1).

The proposed Settlement Agreement resolves all issues between the parties regarding the 1987 Agreement, at a cost of \$1.250 million to ratepayers. This amount represents an allocation of one-half of Tenaska's costs to date to develop its project (Exh. DPU-5). Because this amount will be paid over a period of seven years, the month-to-month impact on ratepayers will be approximately \$0.00008 per kilowatthour, e.g., approximately \$0.04 per month for a customer using 500 KWH per month (Exh. DPU-8). In addition, ratepayers would receive credit for buy-out payments if Tenaska is awarded a power sales contract by Commonwealth Electric in IRM proceedings in the next seven to nine years (Settlement Agreement, § 6.3).

After considering Department precedent and the record in this case, the Department finds that the Settlement Agreement is consistent with the public interest and that, on balance, the buy-out serves the interests of ratepayers as well as the parties and represents a

prudent and reasonable resolution of the dispute in this case. Accordingly, the Department approves the Settlement Agreement.

V. ORDER

ORDERED: That the Settlement Agreement filed by Tenaska Mass, Inc. and Commonwealth Electric Company, is hereby approved.

By Order of the Department,